



REPUBLIC OF KENYA



In re Joyce Murugi Njagi t/a Crossworld Institute of Professional Studies (Insolvency Cause E006 of 2021) [2023] KEHC 20245 (KLR) (Commercial and Tax) (17 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20245 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E006 OF 2021**

A MABEYA, J

JULY 17, 2023

IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2016

AND

IN THE MATTER OF THE INSOLVENCY REGULATIONS, 2016

BETWEEN

JOYCE MURUGI NJAGI T/A CROSSWORLD INSTITUTE OF PROFESSIONAL STUDIES CREDITOR

AND

TWIGA PROPERTIES LTD JUDGMENT DEBTOR

RULING

1. This is an application dated 25/3/2022. It was brought under Order 22 Rule 22, Order 51 Rule 1, Order 22 Rule 52 of the [Civil Procedure Rules](#), and Sections 1A, 3A and 63 (e) of the [Civil Procedure Act](#).
2. The application sought orders for the applicant to liquidate the decretal sum as follows; the principal sum of Kshs. 1,620,000/- be paid to the decree holder forthwith, accrued interest be liquidated in equal installments of Kshs. 250,000/- per month until completion of the accrued interest.
3. The application also sought orders lifting the liquidation orders against the applicant.
4. The grounds for the application were set out in its body and in the supporting affidavit sworn by Brian Kimani on 25/3/2022. It was contended that on 28/1/2022, this Court allowed the petition dated 31/3/2021 thereby granting liquidation orders against the applicant on grounds that it was unable to settle the decree in CMCC 9038 of 2007 dated 7/5/2018.



5. That on 11/3/2022, the creditor herein wrote to the applicant demanding that the applicant should file a statement of affairs with the official receiver within 14 days. That however, the applicant was willing to act in accordance with the lower court judgment and pay the principal amount plus interest totaling to Kshs. 3,796,010/-.
6. That the applicant was willing to pay the principal amount of Kshs. 1,620,000/- forthwith and pay the interest in monthly equal installments of Kshs. 250,000/- per month until the accrued interest was paid in full. That the applicant had already issued cheques dated 25/3/2022 for Kshs. 1,620,000/-.
7. That unless the orders sought were granted, the creditor would proceed with liquidation to the applicant's prejudice, its employees and other dealers yet it was readily able and willing to satisfy the decree.
8. The judgment creditor ("the creditor") vehemently opposed the application. She filed a preliminary objection and grounds of opposition both dated 19/4/2022 as well as replying affidavit of even date sworn by Joyce Murugi Njagi.
9. The objection was to the effect that, the firm of H. Kago & Company Advocates was not properly on record having not complied with Order 9 Rule 9 of the Civil Procedure Rules thus the application ought to be struck out.
10. That final judgment in this matter was made on 28/1/2022 when the firm of Macharia Nderitu & Company Advocates was on record for the applicant. No orders had been made to allow change of representation prior to the filing of the application nor was leave sought to change representation.
11. That the supporting affidavit sworn by Brian Kimani on behalf of the judgment debtor was incompetent as he did not state his relation to the applicant nor produce authority to swear the same.
12. That the decretal sum had been due for a long time as the judgment of the lower court was delivered on 7/5/2018 and decree issued on 6/11/2018 and it remained unsettled. That the amount continued to accrue interest and as at 14/4/2022, the debt stood at Kshs. 5,580,135.95 plus estimated costs of Kshs. 4,300,000/. That the applicant was the owner of LR No 209/2559 together with the building thereon which attracted rent of Kshs. 6 million per month thus the applicant was able to settle the decree at once.
13. That the alleged cheques were never forwarded to the creditor's advocate and were pretender cheques aimed at misleading the Court. That the creditors advocate was only served with the letter dated 25/3/2021 via email on 28/3/2022.
14. That the only remaining option was liquidation which the creditor had already commenced. That the applicant participated in the liquidation proceedings and if it had good faith, it should have completed payment by now.
15. That the applicant waited for the liquidation proceedings to end and only brought the application just when the official receiver was about to gazette the liquidation notice. That there was no explanation for the inordinate delay in settling the decree. That it would be prejudicial to the creditor if the application was allowed.
16. In response, the applicant filed a supplementary affidavit sworn by Brian Kimani on 6/6/2022. He stated that a special resolution had been passed by the applicant authorizing him to swear affidavits on its behalf. That the firm of H. Kago & Company was properly on record as they had filed a consent dated 21/3/2022 together with the notice of change.



17. The creditor similarly filed a further replying affidavit sworn by Joyce Murugi Njagi on 27/6/2022 in response to that of Brian Kimani. It was contended that no consent was filed before the subordinate court between the two firms and no consent was adopted as an order of the court for it to take effect.
18. The application was canvassed by way of written submissions. Those submissions have been considered alongside the rival pleadings and evidence before Court.
19. This Court will first determine the preliminary issue concerning whether the firm of H. Kago is properly on record for the applicant.
20. Order 9 Rule 9 of the [Civil Procedure Rules, 2010](#) provides for change of Advocates to be effected by order of Court or consent of parties. It provides: -
 - a) upon an application with notice to all the parties; or
 - b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be”
21. The provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) make it mandatory that for any change of Advocates after judgment, there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate.
22. The reasoning behind the provision was well articulated in the case of [S. K. Tarwadi v Veronica Mueblmann](#) [2019] eKLR wherein it was observed that: -
 - a) “... In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”
23. In [Lalji Bhimji Shangani Builders & Contractors -v- City Council of Nairobi](#) [2012] eKLR, the Court held that:-
 - a) “A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”
24. When the present petition was filed, the applicant appointed the firm of M/S Macharia Nderitu & Co. Advocates to represent it as evidenced by the notice of appointment dated 25/5/2021. Later on, the firm of H. Kago & Company Advocates filed the notice of change of advocates dated 25/3/2022 and took up the applicant’s representation.
25. By then, judgment had been delivered on 28/1/2022 and therefore Order 9 Rule 9 of the Rules applied. The creditor contended that no consent was filed between the incoming and outgoing advocate nor was there an order of the court allowing such change nor was leave sought.



26. The applicant on the other hand contended that a consent had been entered in the lower court and produced the consent dated 21/3/2022. It thus consented that the firm of H. Kago & Company Advocates was properly on record.
27. This Court has seen that consent. The same was filed in the lower court in CMCC 9038 of 2007 and it read that: -
- “By consent, the firm of H. Kago & Company be granted leave to represent the 1st defendant in place of Macharia Nderitu & Co. Advocates in this matter.”
28. That consent related to the lower court matter. In this case however, the applicant appointed the firm of Macharia Nderitu & Co. Advocates to represent it in the liquidation petition which was an entirely new matter.
29. There ought to have been compliance with Order 9 Rule 9 of the Rules for the firm of H. Kago & Company to be properly on record once it came on record for the applicant after judgment. The consent filed in the lower court should have been filed in these proceedings for the firm of H. Kago and Company to have been properly on record.
30. However, the said firm filed the application dated the 25/3/2022 wherein it purported to come on record, and sought for orders therein. When an objection was raised, the firm sought to cure the error by relying on a consent that did not relate to the matter before court.
31. In *James Ndonyu Njogu v Muriuki Macharia* [2020] eKLR it was held that: -
- “It must be remembered that the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus a party so wishing to change his counsel must notify the Court and other parties.
- Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality.”
32. The Court fully agrees with the forgoing. The applicant ought to have adhered to the law regarding the procedure of representation when exercising its Constitutional right to be represented.
33. Having found that the procedure was not followed by M/s. H. Kago Company Advocates, the said firm is not properly on record and has no legal standing on behalf of the applicant thus all pleadings filed by it are for striking out.
34. The upshot is that the application dated 25/3/2022 is hereby struck out with costs and any interim orders are hereby set aside.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY, 2023.

A. MABEYA, FCIArb

JUDGE

